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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)

Policy and Rules Concerning the)
Interstate, Interexchange Marketplace)

CC Docket No. 96-61

Implementation of Section 254(g) of the)
Communications Act of 1934, as amended)

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PETITION FOR RECONSIDERATION

Western Union Communications, Inc. ("Western Union"), by its attorneys, and pursuant to Section 1.429 of the Commission's rules, 47 C.F.R. § 1.429, hereby submits its petition for reconsideration of the Commission's recent Detariffing Order.^{1/} For the reasons discussed below, Western Union urges the Commission to allow Western Union to continue to file tariffs for "consumer" messaging services.^{2/}

Western Union strongly supports the Detariffing Order's objectives of enhancing competition among providers of interstate, interexchange telecommunications service and

^{1/} See Policy and Rules Concerning the Interstate, Interexchange Marketplace: Implementation of Section 254(g) of the Communications Act of 1934, as amended, CC Docket No. 96-61, Second Report and Order (released October 31, 1996) ("Detariffing Order").

^{2/} Western Union defines consumer messaging services as those telegram and other such services ordered via telephone by entities that have no continuous relationship with Western Union. These are usually individuals who use such services to meet communication needs that cannot be served efficiently in other ways. Today, there are in excess of 200,000 such messages sent each year.

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promoting consumer welfare by eliminating tariff requirements.^{3/} In the particular instance of consumer messaging services, however, Western Union believes that the public interest will not be served by preventing tariffs from being filed.

DETARIFFING CONSUMER MESSAGING SERVICES WILL NOT MEET THE COMMISSION'S STATED PUBLIC INTEREST GOALS

The Commission has concluded that detariffing of interstate services will promote consumer welfare by eliminating the unnecessary costs imposed by tariff regulation and allowing carriers to be more responsive to demand and cost pressures.^{4/} While this conclusion may generally be true, Western Union believes that detariffing of consumer messaging services actually will at best increase the rates of the services, but and most likely will result in the services being withdrawn from the marketplace.

The Detariffing Order recognizes the need for some legal relationship between user and carrier to establish the terms and conditions of service -- including liability. It suggests that in place of tariffs carriers "issue short, standard contracts that contain their basic rates, terms and conditions for service."^{5/} While this may be practical in most situations, it is impractical and legally unworkable with respect to consumer messaging services.

Historically, persons sending telegrams wrote their messages on a blank form which also set forth the terms and conditions that limited liability to an amount equal to the rate for transmitting the message. Western Union Tel. Co. v. Esteve Bros. & Co., 256 U.S. 566, 568-70 (1921) ("Esteve"). Further, the customer was bound by these terms. The law was

^{3/} Detariffing Order at ¶ 52.

^{4/} Id. at ¶ 53.

^{5/} Id. at ¶ 57.

clear that "one who writes a telegraphic message on a blank, which contains printed terms and conditions, will be held bound by them so long as they do not contravene public policy." Richard A. Lord, Williston on Contracts, § 6:44 at 486 (citing Esteve). However, today consumer messaging customers phone in their messages and, accordingly, there is no opportunity for a carrier to reduce to writing the rates, terms and conditions of service. While an operator or clerk could read the terms and conditions of service to the user, this would only be an invitation to confusion and misunderstanding. It is even questionable whether courts would give effect to such an approach.

In the absence of any effective way to protect themselves against unreasonable legal claims, providers of consumer messaging services will have to evaluate if they can increase their rates to cover their increased liability^{6/} or whether the services, as a practical matter, would need to be discontinued. Thus, detariffing consumer messaging services is likely to have the result of limiting consumer options, increasing subscriber costs, or both.

^{6/} The Commission and the Courts historically have recognized the need for telecommunications carriers to limit their liability. In the O'Brien decision, for example, which involved transmission of a potentially defamatory telegram, the First Circuit acknowledged the unfair burden placed on telegraph companies that contractually limiting liability would impose:

If the telegraph companies are to handle such a volume of business expeditiously, . . . their agents cannot spend much time pondering the contents of the messages with a view to determining whether they bear a defamatory meaning, and if so, whether the sender might nevertheless be privileged. The effect of putting such a burden upon the telegraph companies could only result in delayed transmission of, and in some cases refusal to transmit, messages

O'Brien v. Western Union Tel. Co., 113 F.2d 539, 542 (1st Cir. 1940) ("O'Brien").

CONCLUSION

For the reasons discussed above, Western Union urges the Commission to reconsider its Detariffing Order in a very limited area, but one important to many small users: consumer messaging services. While detariffing will enhance competition and promote consumer welfare with respect to most interstate telecommunication services, it is clear that detariffing of consumer messaging services will not.

Respectfully submitted,

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